Filed 5/29/19 Marriage of Prado-Lowance & Lowance CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of MAGDALENA PRADO-LOWANCE and PHILLIP D. LOWANCE.	
MAGDALENA PRADO-LOWANCE, Appellant, v. PHILLIP D. LOWANCE, Respondent.	G054515 (Super. Ct. No. 10D005070) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Claudia J. Silbar, Judge. Affirmed. Motion to dismiss appeal denied.

Magdalena Prado-Lowance, in pro. per.; and Ariel A. Tello for Appellant.

Kerwin & Associates, William F. Kerwin, for Respondent.

Magdalena Prado-Lowance (wife) appeals from the trial court's order denying her motion for relief from judgment pursuant to Code of Civil Procedure section 473, subdivision (b) (hereafter 473(b)). In addition to responding on the merits, Phillip D. Lowance (husband) filed a motion to dismiss this appeal, which we ordered to be decided in conjunction with our decision on the appeal. We conclude the trial court did not err in denying wife's 473(b) motion, and consequently affirm that order. We also deny husband's motion to dismiss the appeal.

FACTUAL AND PROCEDURAL HISTORY

This appeal arises from a marital dissolution action initiated in 2010 by husband against wife. On December 17, 2015, a stipulated judgment of dissolution was entered and filed. The judgment reflected the mutual settlement agreement reached between husband and wife in the midst of a hearing that took place on January 26 and 27, 2015. Both parties were present in court and, following extensive voir dire by the court and counsel, both agreed to the terms of the settlement. Appended to the judgment is a 37-page attachment, signed by the trial court on December 17, 2015, that spells out in full detail the parties' dissolution agreement and their stipulations.

On March 30, 2016, wife filed a motion for an order "For relief from the December 17, 2015 judgment, under . . . 473[b]." On December 16, 2016, the trial court heard and denied her motion for relief. Wife filed a notice of appeal from that denial on January 13, 2017.

In her original "Statement of Appealability," and throughout her original opening brief, wife stated she "appeals to [this court] for an [o]rder reversing the [j]udgment entered on December 17, 2015 . . . ." That opening brief was signed by wife, and dated October 16, 2017.

Almost a year later, on September 24, 2018, wife filed a "Notice of Errata Re: Appellant's Opening Brief on the Merits." In it, wife purported to submit "corrected pages to [her opening brief]" because the original pages "omit the order" she originally

specified in her notice of appeal. Thus, her "corrected" opening brief states she is not appealing from the December 2015 judgment, but rather from the trial court's December, 2016 order denying her motion for relief under section 473(b).

Wife's "errata" were substantive and did not merely correct typographical errors or make minor changes to her brief. Moreover, the notice was filed long after husband's respondent's brief, which was filed in April 2018. Husband's brief argued primarily that wife's appeal was untimely and that it was not taken from an appealable order. In fact, after the record was filed in this court, but before filing his respondent's brief, husband had also filed a motion to dismiss the appeal, and wife filed an opposition.

We are troubled by wife's initial failure to provide her actual statement of appealability in her opening brief, and tardily correcting it a year later with an "errata." Besides helping the appellate court determine that it actually has jurisdiction to hear a matter, the rule requiring an accurate statement of appealability (Cal. Rules of Court, rule 8.204(a)(2)(B); all rule references are to the Cal. Rules of Court) has the beneficial collateral effect of alerting the respondent of the need to defend the specific order or judgment the appellant seeks to attack. (*Ellis v. Ellis* (2015) 235 Cal.App.4th 837, 846.) Waiting to file her "errata" until after husband had already filed his respondent's brief is unfair, if not suspect.

Nevertheless, because wife's original notice of appeal stated she was appealing from the trial court's order denying her 473(b) motion, we shall consider her appeal accordingly. We emphasize that no appeal was taken from the December 2015 judgment and, as explained below, its validity is not before us.

DISCUSSION

1. Appealability

Because her "errata" clarified wife is not appealing from the December 2015 judgment, both parties' discussions in their briefs regarding its appealability are beside the point. While the 2015 judgment was at one time appealable, such an appeal

would have been untimely when wife filed her notice of appeal in January 2017. (*Gassner v. Stasa* (2018) 30 Cal.App.5th 346, 350-351 (*Gassner*); rules 8.104, 8.108.) Even though a motion to vacate a judgment under 473(b) may act to extend the time to appeal from a judgment, in this instance it would still have been untimely. (Cf. *Shisler v. Sanfer Sports Cars, Inc.* (2008) 167 Cal.App.4th 1, 5, fn. 2.) The 2015 judgment is therefore not before us.

The question remains whether wife may appeal from the denial of her 473(b) motion and, if so, was her notice of appeal timely filed? She may, and it was. Husband's motion to dismiss the appeal is therefore not well-taken.

"An order denying relief from a judgment under section 473(b) is a separately appealable postjudgment order under Code of Civil Procedure section 904.1, subdivision (a)(2)." (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 927, fn. 6; *Burnete v. La Casa Dana Apartments* (2007) 148 Cal.App.4th 1262, 1265 [an order denying such a motion is regarded as a special order made after final judgment and is appealable].)

Section 473(b) states a "court may, upon any terms as may be just, relieve a party . . . from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." An "application" for relief under this section "shall be made within a reasonable time, in no case exceeding six months, after the judgment . . . was taken." (*Ibid.*) "The six-month limit is mandatory; a court has no authority to grant relief under [473(b)], unless an application is made within the six-month period." (*Arambula v. Union Carbide Corp.* (2005) 128 Cal.App.4th 333, 340, 345.)

Wife's March 30, 2016 "application" was within six months of the December 17, 2015 judgment. Her notice of appeal from the court's December 16, 2016 order denying her "application" for relief under 437(b) was filed on January 13, 2017. Thus, her appeal from the 473(b) denial is timely because it was filed within 60 days of

the court's order denying her motion. (Rule 8.104(a)(1)(C).) Husband's motion to dismiss the appeal is therefore denied.[1]

2. The Scope of the Appeal

Other than the appealability issues, the parties have devoted most of their discussions to the details of the underlying stipulations and agreements contained in the final dissolution judgment. However, none of these questions is properly before us.

Our consideration of any issues arising from the January 2015 settlement agreement, any interim hearings, and the court's December 2015 final order entering its judgment, "is jurisdictionally barred by appellant's failure to file a timely notice of appeal from either the stipulated agreement or the dissolution judgment. [¶] Thus, the only justiciable issue before this court is the propriety of the trial court's denial of appellant's motion to set aside the dissolution judgment pursuant to section 473." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117, fn. omitted (*King*).)

Aside from timeliness, if the original judgment is not appealable in its own right, it cannot be made so """by the device of moving to vacate the order and appealing from a ruling denying the [473(b)] motion."""" (*I.J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331.) Put another way, "[a]n order denying a motion to vacate an appealable judgment is generally not appealable if such appeal raises only matters that could be reviewed on appeal from the judgment itself. The reason for this general rule is that to allow the appeal from the order of denial would have the effect . . . in some cases [to] permit circumvention of the time limitations for appealing from the judgment." (*Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 358.)

Consequently, "'[a] postjudgment order cannot be appealed on issues that could have been reviewed on appeal from the prior judgment; a *new issue* must be raised. . . .'" (*Gassner, supra*, 30 Cal.App.5th at p. 356; *Lakin v. Watkins Associated*

[1] Because we find an appeal from the underlying judgment would be untimely, we need not address husband's additional claim that stipulated judgments are not appealable.

Industries (1993) 6 Cal.4th 644, 651 ["the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment"].)

Wife's "errata" notwithstanding, we are thus limited to a very narrow review of the trial court's denial of wife's 473(b) motion to set aside the dissolution judgment; the merits of the underlying judgment itself are simply not before us. (*King, supra,* 80 Cal.App.4th at pp. 116-118.)

3. The Trial Court Did Not Err in Denying Wife's 473(b) Motion

A. Standard of Review

"The standard for appellate review of an order denying a motion to set aside under section 473 is quite limited. A ruling on such a motion rests within the sound discretion of the trial court, and will not be disturbed on appeal in the absence of a clear showing of abuse of discretion, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice. Where a trial court has discretionary power to decide an issue, an appellate court is not authorized to substitute its judgment of the correct result for the decision of the trial court. [Citations.] '"'"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" [Citations.]' [Citation.] The burden is on the complaining party to establish abuse of discretion, and the showing on appeal is insufficient if it presents a state of facts which simply affords an opportunity for a difference of opinion. [Citation.]" (*King, supra,* 80 Cal.App.4th at p. 118, fn. omitted.) "The decision to grant relief on this basis 'is addressed to the sound discretion of the trial court and in the absence of a clear showing of abuse thereof, the exercise of that discretion will not be disturbed on appeal.' [Citation.]" (*Younessi v. Woolf* (2016) 244 Cal.App.4th 1137, 1144.)

B. Wife's Claims of Error

Wife's grounds for appeal are stated as: "1) The judgment is not pursuant to Fam. Code § 2550 and California Code of Civil Procedure §664. [¶] . . . [¶] 2) The judgment does not reflect the equal division of community property pursuant to Fam. Code §§63, 2551, 2552 . . . . [¶] 3) There [are] a number of clerical errors and material omissions of the Court's prior orders [in the judgment]. . . . [¶] 4) [Wife] has not received fair treatment by the court. . . ."

The first three enumerated grounds relate to the details and merits of the underlying judgment and, as noted above, are not before us. Because wife did not appeal from the judgment, we have no jurisdiction to review its adequacy or correctness. Thus, wife's first three issues are not within our purview, and we deem them unreviewable. (See *In re Matthew C.* (1993) 6 Cal.4th 386, 393, superseded by statute on other grounds by Welf. & Inst. Code, § 366.26, subd. (*l*)(1)(C) ["If an order is appealable . . . and no timely appeal is taken therefrom, the issues determined by the order are res judicata"].)[2]

The only remaining ground for her appeal is wife's contention she did not receive "fair treatment by the [trial] court." Moreover, this claim is correspondingly limited to the trial court's "treatment" with regard to the 473(b) hearing only, and not in any prior proceedings. So limited, the trial court did not err in denying wife's 473(b) motion.

C. There Was No Abuse of Discretion

Even though wife filed her "errata" to "correct" what she was appealing from, most of the arguments in her opening brief still focus on the underlying judgment. It is not until her reply brief that she first discusses the 473(b) hearing in any detail or

[2] The trial court in part denied wife's 473(b) motion because the substantive issues raised in her motion were already addressed in the entry of judgment, and were res judicata.

offers any legal authority for her argument. Even then, she ends her reply brief by referring back to the inadequacies of the underlying judgment.

Arguments and authority raised for the first time in a reply brief are untimely, unfair to the opposing party, and are normally disregarded. (*WorldMark, The Club v. Wyndham Resort Development Corp.* (2010) 187 Cal.App.4th 1017, 1030, fn. 7.) Thus, "points raised for the first time in a reply brief on appeal will not be considered, absent good cause for failure to present them earlier." (*Nordstrom Com. Cases* (2010) 186 Cal.App.4th 576, 583.) We do not find good cause and, to that extent, we disregard any arguments wife makes for the first time in her reply brief.[3]

In assessing this case, *In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673 (*Rosevear*) is particularly instructive. In that case, just as here, both parties were represented by counsel during an all-day settlement conference in the course of which they discussed the issues between themselves and their attorneys, and each side made certain concessions to the other. At the conclusion of their discussions, the parties reached an agreement that was read into the record in the presence of the parties and their attorneys. The trial court carefully admonished both parties about the binding nature of their stipulated agreement, and asked each of them if they had heard the agreement as read, understood its terms, had the opportunity to discuss it with their attorneys, and agreed to be bound by it. Each spouse responded affirmatively. (*Id.* at pp. 679-680.)

The husband filed a motion to enter judgment, and the wife thereafter filed a motion pursuant to 473(b) to set aside the stipulated judgment on the alleged grounds of duress, undue influence and mistake. The trial court granted the husband's motion to

---

[3] For example, for the first time in her reply brief wife claims the trial court erred by ignoring Family Code section 2120, subdivision (c), regarding an allegedly inequitable division of marital property. We do not consider this claim, but even if we were to do so, it is once more a collateral attack on the terms of the underlying judgment, and something not before us.

enter judgment and denied the wife's motion to set it aside. It found both parties had been represented by counsel at the conference, and had been properly and thoroughly voir dired by the court before settlement was approved and entered. The wife appealed from, among other things, the denial of her 473(b) motion to set aside the stipulated judgment. The appellate court affirmed. (*Rosevear, supra*, 65 Cal.App.4th at pp. 680-687.)

Here, as in *Rosevear*, wife was voir dired extensively in open court by the trial court and counsel, and agreed to the stipulated dissolution settlement. She responded affirmatively to every question posed about her knowledge and understanding of, consent to, and discussion with her attorney about every issue in this case, and she acknowledged she understood and agreed to be bound by the terms of the settlement.

Aside from the evidence of her express acknowledgments on voir dire, here the record shows that every fact she now claims as a basis for seeking reversal of the judgment was known to her prior to the hearing and at the time she stipulated on the record to the settlement agreement. Similarly unavailing are wife's assertions that she failed to obtain an equitable division of community property because of the mistakes of her attorney. As held in *Rosevear*, the alleged negligence of the appellant's attorney does not by itself provide grounds for setting aside the judgment. (*Rosevear, supra*, 65 Cal.App.4th at p. 686.)

Section 473(b) permits a court to "relieve a party . . . from a judgment . . . taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." The trial court found wife had failed to meet her burden of proof under 473(b), and explained why it found no fraud, mistake, surprise or excusable neglect. Moreover, it found wife's declaration in support of her motion lacked credibility, and explained at length why it did so. Our review of the transcript of the 473(b) hearing fully supports the court's findings. Thus, the court's order denying wife's 473(b) motion was well within its discretion.

D. Mandatory Relief Under 473(b) Was Unavailable

For the first time in her reply brief, wife argues she was entitled to "mandatory relief" under 473(b), regardless of whether her attorney's purported neglect was excusable or not. Not so. As noted above, we disregard any arguments wife makes for the first time in her reply. But even if we were to consider her argument, it would fail on the merits.

The portion of 473(b) wife refers to provides, "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, *and is accompanied by an attorney's sworn affidavit* attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting *default* entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting *default judgment or dismissal* entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (Italics added.) By its very terms, this provision refers to default judgments and dismissals, not stipulated settlements and judgments. Furthermore, it requires an attorney's sworn affidavit. Neither is present here.

Wife's authority offers her no support. Her citation to *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600 (*Pietak*), is singularly inapt because it actually shows why she is not entitled to relief under the mandatory provisions of 473(b). In *Pietak*, the moving party's attorney submitted two declarations, neither of which contained "any sworn admission of mistake, inadvertence, surprise or error that resulted in a dismissal of claims." (*Pietak*, at pp. 607, 609.) The court stated, "Relief under the mandatory provision of section 473[b], is available *only* when the application is accompanied by 'an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect . . . .' This *indispensable* admission by counsel for the moving party that his error resulted in the entry of a default or dismissal from which

relief is sought is commonly referred to as an 'attorney affidavit of fault.'" (*Id.* at pp. 608-609, italics added.) "No such affidavit was filed by Pietak's attorney . . . . Pietak has not demonstrated he is entitled to relief under the mandatory provision of section 473[b]." (*Id.* at p. 609.)[4]

So too here. There is no affidavit from wife's trial counsel in the record. Instead, we have only wife's conclusory allegations regarding her counsel's purported "errors and mistakes," which the trial court found incredible. Consequently, she was not entitled to mandatory relief under 473(b).

E. There Is No Showing of Trial Court Bias

Wife next contends the trial court was biased against her personally. We are not persuaded.

In essence, wife's argument is that the trial court's rejection of her motion to set aside the judgment itself shows bias. But she has offered no legal authority to support such an assertion. Arguments made without citation to supporting legal authority are deemed waived. (*Gonzalez v. City of Norwalk* (2017) 17 Cal.App.5th 1295, 1311.)

She alleges the trial court "expressed an extreme level of impatience and biases [*sic*] . . . as evidenced by the statements of the judge made on the record during the trial as well as at the [473(b)] hearing," but she does not identify what statements she is referring to. Her only record reference from the 473(b) hearing involves a colloquy between the court and her attorney; one that had nothing to do with wife.

Wife stated in her declaration in support of her 473(b) motion that she was "coerced and pressured by the court" into accepting the assistance of a volunteer attorney. This claim is belied by the record of the January 27, 2015, hearing where the stipulated

---

[4] Wife's citation to *J.A.T. Entertainment, Inc. v. Reed* (1998) 62 Cal.App.4th 1485, is also inapposite, as it was a case involving relief from a dismissal, not a stipulated judgment. (*Id.* at p. 1487.) Moreover, in that case there was an attorney's declaration admitting and explaining his negligence in not listening while the opposing party brought a motion to dismiss. (*Id.* at p. 1492.)

dissolution was reached: "[Wife's Counsel:] I had started out as a friend of the court. I'm going—now going to substitute in, with the court's permission, as counsel for [wife]." [¶] Is that okay? [¶] [Wife]: Yes."

The trial court found the allegations wife made in her declaration in support of the 473(b) motion not credible. From this, wife now asserts this "undermines every aspect of objectivity and fairness." She insists she has no "history of being non credible but has a cultural background from Ecuador which governs most of her behavior." Whether that is true or not, on appeal we do not reweigh credibility determinations. Moreover, here the court's credibility findings are supported by the fact that wife's claims in her declaration are largely inconsistent with the reporter's transcript of the original settlement hearing; something the court emphasized at the 473(b) hearing was significant to its credibility determination.

"When making a ruling, a judge interprets the evidence, weighs credibility, and makes findings. In doing so, the judge necessarily makes and expresses determinations in favor of and against parties. How could it be otherwise? We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias." (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219.) Bias is determined under the objective standard of whether a reasonable member of the public would fairly entertain doubts about the judge's impartiality. (*People v. Panah* (2005) 35 Cal.4th 395, 446.)

"'Bias or prejudice consists of a "mental attitude or disposition of the judge towards [or against] a party to the litigation. . . .'" [Citations.] Neither strained relations between a judge and an attorney for a party nor '[e]xpressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice.'" (*Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724.)

Lastly, wife argues the fact the trial court could, and should, have modified the judgment establishes she was treated unfairly. We lack jurisdiction to review the underlying judgment in this case. But even if that decision were erroneous, it would not be enough to establish bias amounting to a due process violation warranting reversal. (*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665, 674 [trial court's adverse rulings do not reflect personal bias]; *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 59-60 [erroneous rulings without more do not establish judicial bias].)

In our review of the transcript of the 473(b) hearing, we have found no evidence of bias. As such, we reject wife's claim of judicial bias.

F. Wife Is Not Entitled to Equitable Relief

Finally, wife appeals to basic equitable principles in contending she should have been given 473(b) relief from the judgment. In support, she cites *In re Marriage of Umphrey* (1990) 218 Cal.App.3d 647 (*Umphrey*), and *In re Marriage of Alexander* (1989) 212 Cal.App.3d 677 (*Alexander*). Neither case is apt. In *Umphrey,* a motion to set aside a marital dissolution judgment was brought after the expiration of the six-month jurisdictional limitations of 473(b). (*Umphrey,* at p. 655.) The court entertained the underlying merits under its general equity power in "exceptional circumstances." (*Ibid.*) *Alexander* is similar, where wife also did not bring her 473(b) motion within the six-month time limit. (*Alexander,* at p. 680.) The trial court made a specific finding there was no extrinsic fraud in the matter, but nonetheless went on to set aside the judgment on the grounds it was inequitable and lacked a knowing waiver of wife's rights. (*Id.* at pp. 680-681.) The appellate court reversed, however, as this was outside the meaning of "exceptional circumstances." (*Id.* at p. 681.)

Here, in contrast, wife brought a timely 473(b) motion, and it was heard on the merits. Moreover, there was no allegation—nor any evidence—of the "extrinsic fraud or mistake" the *Umphrey* court found necessary. Moreover, here wife had an

adequate remedy at law to challenge the judgment in this case: an appeal. She cannot now invoke equity as a way to escape the fact her appellate remedy is time-barred.

We are bound by the trial court's credibility findings and by its resolution of conflicting inferences. (*In re Marriage of Ciprari* (2019) 32 Cal.App.5th 83, 93-94.) We presume that a trial court's ruling is correct unless and until an appellant shows us otherwise. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Here, wife has not made such a showing. On this record, we conclude the trial court did not abuse its discretion in denying wife's 473(b) motion to set aside the judgment. (*King*, *supra*, 80 Cal.App.4th at pp.121-122.)

DISPOSITION

The trial court's order denying wife's motion for relief from the judgment is affirmed. Husband's motion to dismiss the appeal is denied. Husband is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.